STATE OF MICHIGAN

COURT OF APPEALS

CANDICE BINNO, Personal Representative of the Estate of RYAN BINNO, Plaintiff-Appellant, v FREDERICK BINNO, GIAN BENCIVENGA and JEFFREY DABISH, Defendants-Appellees.	UNPUBLISHED June 15, 2010 No. 291437 Oakland Circuit Court LC No. 2007-086216-NO

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The following facts have not been contradicted by any substantively admissible evidence. On July 8, 2007, defendants Frederick Binno, Jeffrey Dabish, and Gian Bencivenga made plans to go for a drive in a pontoon boat on Cass Lake. Later that morning, Frederick and Dabish picked Bencivenga and a girl named Megan up on the boat. Thereafter, Frederick and Dabish picked up decedent Ryan Binno, Johnathan Francis, Jessica Francis, Anna D'Alessandro, and Sheila Seman. They drove to the sandbar, which is a spot where other boaters went to socialize on the water. The party remained at the sandbar for a few minutes. Bencivenga and Megan were then dropped off at Bencivenga's home. Then, either Frederick or Dabish drove the pontoon boat to an area near the middle of the lake.

As the pontoon boat neared the middle of the lake, Johnathan and D'Alessandro asked the driver to stop because they wanted to go for a swim in the lake. Neither Frederick nor Dabish anchored the pontoon boat; the engine was turned off.[1] After swimming in the lake for a few minutes, Johnathan and D'Alessandro returned to the pontoon boat. They returned not

[1] D'Alessandro testified that Frederick attempted to anchor the pontoon boat. Frederick did not recall whether the pontoon boat was anchored.

because the weather conditions warranted it or because they feared for their safety, but merely because they wanted to do so. Following their return to the pontoon boat, there was some discussion amongst the others about going swimming in the lake. After a time, Frederick, Johnathan, Jessica, Anna, and Ryan went for a swim in the lake. Within minutes, the weather conditions suddenly changed and the speed of the wind increased, which caused the waves to become bigger and made it difficult for some of the swimmers to swim back to the pontoon boat. Johnathan, Jessica, and Anna were all concerned for their safety. Ryan did not show any outward signs of distress, nor did he verbally indicate that he was having any trouble swimming.

Frederick made it back to the pontoon boat first. After that, either he or Dabish drove the pontoon boat closer to the swimmers. In the meantime, Seman threw life jackets to the remaining swimmers and kept a watchful eye out for them. Seman saw Ryan's head go under the water and come back up. At first, Seman thought that Ryan had gone under the water to try to grab Johnathan's leg, but after Ryan went under the water a second time, she became concerned. Seman called 911 and told Frederick that she no longer saw Ryan. Frederick jumped into the lake to look for Ryan. After Johnathan, Jessica, and Anna made it safely to the pontoon boat, Johnathan also jumped into the lake to look for Ryan. Ryan drowned before he could be rescued.

Following Ryan's death, plaintiff filed suit against Frederick, Dabish, and Bencivenga alleging negligence, willful and wanton misconduct, and gross negligence. Frederick moved for summary disposition on December 30, 2008. Dabish moved for summary disposition on January 9, 2009. Bencivenga failed to file a motion for summary disposition by the court-ordered deadline, and accordingly, on January 12, 2009, filed a motion for leave to file a motion for summary disposition. On January 20, 2009, the trial court denied Bencivenga's motion. Bencivenga then concurred with Frederick's motion for summary disposition. Without oral argument, the trial court granted Frederick and Dabish's motions for summary disposition and dismissed all claims against Bencivenga.[2] This appeal followed.

II. APPLICABLE LAW AND ANALYSIS

We review de novo a trial court's grant or denial of a motion for summary disposition. *Adair v Mich*, 470 Mich 105, 119; 680 NW2d 386 (2004). We also review questions of statutory construction de novo. *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party is entitled to a grant of summary disposition if the party demonstrates that no genuine issue of material fact exists. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2006). The party must support its claim with pleadings, affidavits, depositions, admissions, and any other admissible evidence. *Coblentz*, 475 Mich at 569. Mere speculation

[2] Pursuant to MCR 2.119(E)(3), a trial court may render a decision without oral argument.

and conjecture cannot give rise to a genuine issue of material fact. See *Quinto v Cross & Peters Co*, 451 Mich 358, 371-372; 547 NW2d 314 (1996).

To establish a prima facie case of negligence, a plaintiff must prove that a defendant owed the plaintiff a duty, the defendant breached that duty, the defendant's breach caused the plaintiff's injuries, and the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Whether a defendant owes a duty to a plaintiff is a question of law. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004). A duty can arise by statute or by common law. *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009).

A. STATUTORY DUTY OF CARE

Plaintiff argues that Frederick and Dabish had a statutory duty to: 1) anchor the pontoon boat once they stopped in the middle of the lake, 2) ensure that the pontoon boat remained close to Ryan and the other swimmers, 3) maintain a careful lookout to ensure the safety of swimmers and to be able to render aid if necessary, 4) supervise Ryan and the other swimmers while they were in the water, 5) require Ryan and the other swimmers to wear life jackets while in the water, and 6) pay attention to the weather and wind conditions. Plaintiff relies on MCL 324.80144(2) and MCL 324.80103(g).

MCL 324.80144, which imposes a duty to operate a vessel with due regard for others, states in relevant part:

> 1) When vessels are being operated in such a manner as to make collision imminent or likely, the following apply:
>
> * * *
>
> 2) This section does not relieve the operator of a vessel otherwise privileged by this section from the duty to operate with due regard for the safety of all persons using the waters of this state.[3]

Pursuant to MCL 324.80103(g), a person operates a vessel if he or she is "in control of a vessel while the vessel is under way and is not secured in some manner such as being docked or at anchor." "Operator" is defined as "the person who is in control or in charge of a vessel while that vessel is under way." MCL 324.80103(h). The pertinent question in this case is what it means for a vessel[4] to be "under way" and the interpretation of the term "operate."

[3] See also MCL 324.80145, which states in relevant part: "A person operating or propelling a vessel upon the waters of this state shall operate it in a careful and prudent manner and at such a rate of speed so as not to endanger unreasonably the life or property of any person." A boat is a vessel. MCL 324.80101(d).

[4] A "vessel" means "every description of watercraft used or capable of being used as a means of transportation on water." MCL 324.80104(q).

In its March 20, 2009, opinion and order, the trial court rejected plaintiff's argument that Frederick and Dabish owed Ryan a statutory duty pursuant to MCL 324.80144(2). The trial court held that because the pontoon boat was not actively involved in creating or causing the injury to Ryan, MCL 324.80144(2) did not impose a statutory duty upon Frederick and Dabish. Interpreting the applicable statutory language, the trial court held that the Legislature intended to create a duty only when a boat is actively progressing (or under way) and only to prevent an injury involving the boat. Specifically, the trial court stated that the Legislature did not intend to impose a statutory duty on a boat operator to "prevent an injury [that] occurs a distance away from the vessel after the vessel's motor is turned off and the vessel is armed with adequate life jackets which the adult passengers elect not to use . . . ." Hence, the trial court held that because the pontoon boat was not "actively involved in the injury (with its engine on), i.e., collided with a swimmer[,]" MCL 324.80144(2) was not applicable to this case. On appeal, plaintiff argues that the trial court erroneously interpreted MCL 324.80144(2) and MCL 324.80103(g).

The goal of statutory interpretation is to give effect to the intent of the Legislature. *Booker v Shannon*, 285 Mich App 573, 575; 776 NW2d 411 (2009). The first step in determining the intent of the Legislature is to look to the language of the statute. *United States Fidelity Ins & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 13; ___ NW2d___ (2009). If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005). The Legislature is presumed to have intended the meaning it plainly expressed, *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), and clear statutory language must be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007).

The applicable statutes do not define what it means for a vessel to be "under way." Where a term is not defined in a statute, we may consult dictionary definitions to determine the meaning of the term. *Sanchez v Eagle Alloy Inc*, 254 Mich App 651, 668; 658 NW2d 510 (2003). *Random House Webster's College Dictionary* (2000) defines "under way" as "no longer in port or at anchor; moving." The nautical definition of "under way" means "[n]ot anchored and not moored to a fixed object: in motion." *Webster's II New College Dictionary* (3rd) (2005). "In motion" means "in active operation; moving." *Random House Webster's College Dictionary* (2000). Applying these definitions to the legislatively defined term "operate," we find that a vessel is "under way" whenever it is in motion or moving, and it is neither anchored nor docked. Because we find that a vessel can be "in motion" without being actively propelled by an engine or some other device, we disagree with the trial court's finding that, in the context of this case, "under way" simply and singularly meant "actively progressing" with the engine running. For that reason, we hold that the trial court erred when it concluded that neither Frederick nor Dabish owed Ryan a statutory duty of care under MCL 324.80144(2).

Nevertheless, we agree with the trial court that Frederick and Dabish did not breach a duty owed to Ryan under the statute. A plain reading of the relevant statutes does not reflect that the Legislature intended to impose a duty of care where the operation of the vessel is not the cause of an injury. Where the intent of the Legislature cannot be discerned from the plain language of the statute, a court may engage in judicial construction to determine the meaning of the statute. See *Adrian Sch Dist v Mich Pub Sch Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998). In doing so, a court must consider the "object of the statute in light of

the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994). A court should always use common sense when considering these factors. *Id*.

Nothing in the language of the applicable statutes mandates that an operator of a vessel must anchor the vessel while in the water. Nor can a reasoned argument be made that the statutes require that a vessel operator assume lifeguard-like duties when adult swimmers choose to swim in a lake. Ryan was an experienced adult swimmer who presumably knew the potential dangers of swimming in a lake, especially on a busy day. As the trial court noted, to accept plaintiff's interpretation of the applicable statutes would be "tantamount to making boat owners and/or operators absolute insurers of the safety of all adult passengers who elect to jump in the water for a swim . . . ." No reasoned argument can be made that the Legislature intended that a vessel operator assume lifeguard-like duties when adult swimmers choose to swim in a lake. Had the Legislature intended this to be the case, it could have expressed this intent in the statute. Therefore, the trial court did not err when it granted defendants' motions for summary disposition.

Plaintiff also argues that Frederick and Bencivenga, as owners of the pontoon boat, breached a duty of care owed to Ryan. Plaintiff relies on MCL 324.80157, which states that an owner of a vessel is liable for the negligent operation of the vessel when the vessel is being used with the owner's express or implied consent. It is disputed as to whether Frederick or Bencivenga owned the pontoon boat. However, to survive summary disposition, plaintiff had to show that the pontoon boat was operated in a negligent manner. For the reasons already expressed, plaintiff cannot show that either Frederick or Dabish's operation of the pontoon boat breached a duty of care owed. Because plaintiff failed to show the required negligence, the trial court properly granted summary disposition regarding this issue.

B. COMMON LAW DUTY OF CARE

Next, plaintiff argues that the trial court erred when it held that Frederick and Dabish did not breach a common law duty of care owed to Ryan. Plaintiff argues that under the common law, Frederick and Dabish owed Ryan the same duties of care mandated by MCL 324.80144(2) and MCL 324.80103(g). We disagree.

> In determining whether a duty exists, courts look to different variables, including the (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. [*Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14-15; 596 NW2d 620 (1999).]

Generally, without more, that an injury or event is foreseeable is not sufficient to impose a duty upon the defendant. *Id*. at 15. "[R]ather, the question is whether, in light of all the relevant evidence, 'the defendant is under any obligation for the benefit of the particular plaintiff . . . .'" *Id*., quoting *Terry v Detroit*, 226 Mich App 418, 424-425; 573 NW2d 348 (1997).

While tragic, Ryan's death was not foreseeable. The record reflects that Johnathan and Anna went swimming in the lake without incident immediately prior to Ryan and the others swimming in the lake. The uncontested testimony reflected that before the winds changed, the swimmers, including Ryan, were able to tread water safely. The winds did not change until after Ryan and the others were in the water, and the change was sudden. The testimony reflected that Ryan did not show any signs of distress. The record reflected that once it became apparent that the swimmers were having trouble treading water, either Frederick or Dabish moved the boat closer to the swimmers' location, and other than Ryan, all the swimmers returned safely to the boat. For these reasons, it also cannot be reasonably said that there was a degree of certainty that when Ryan jumped into the water he would drown.

In addition, there is no indication in the record that a special relationship existed between Ryan and either Frederick or Dabish that would warrant a finding that a common law duty of care existed. Under Michigan law, absent a special relationship, a person does not have a duty to aid someone in peril. *Downs v Saperstein Assoc Corp*, 265 Mich App 696, 701; 697 NW2d 190 (2005). Even if a special relationship existed between Ryan and either Frederick or Dabish, plaintiff has not presented any case law below or on appeal to support her argument that the duty of care included the duties alleged. Also, the testimony reflected that there was a lack of connection between Frederick and Dabish's alleged negligence and Ryan's death. Other than speculation, plaintiff presented no evidence that had Frederick and Dabish performed the duties alleged, Ryan would not have drowned. Again, the witnesses to the incident testified that the water conditions suddenly changed after they had jumped into the lake. After the conditions changed, the pontoon boat was moved closer to the swimmers and life jackets were thrown to the swimmers who expressed distress. The uncontested testimony reflected that Ryan showed no signs of distress. There was no evidence that Ryan, an experienced swimmer, attempted to swim to the pontoon boat. Moreover, plaintiff presented no evidence that even if Frederick or Dabish had anchored the boat, it would not have drifted away from Ryan and the other swimmers, or they from the boat.

Additionally, the trial court correctly concluded that no moral blame should be attached to Frederick and Dabish's actions. There is no evidence in the record that their actions were part of a calculated plan to harm Ryan. Nor is there any evidence in the record that either Frederick or Dabish should have known that Ryan was likely to drown and took no steps to prevent the harm from occurring. Further, the policy of preventing future harm is not particularly strong in this case. Ryan was an experienced adult swimmer who made the decision to swim in the lake with knowledge of the potential risks and without a life jacket. Plaintiff fails to explain how Frederick or Dabish could have prevented Ryan from swimming in the lake or how they could have forced Ryan to wear a life jacket if he did not want to do so. Also, even if Frederick or Dabish should have anchored the pontoon boat, as will be further discussed below, plaintiff failed to present any evidence that the pontoon boat would not have drifted away from the swimmers or the swimmers from the boat, or that Ryan would not have drowned. The record reflects that Seman kept a close look out for all the swimmers, and that once the conditions warranted it, the pontoon boat was moved closer to the swimmers and steps were taken to assist the swimmers who indicated that they needed aid. Again, the witnesses to the incident testified that Ryan did not show signs of distress or indicate that he required assistance.

Finally, given the circumstances of this case, the burden and consequences of imposing the duties alleged and the resulting liability is too great. To impose such duties would alleviate any obligation on an adult swimmer to exercise reasonable care for his or her own safety. Also, imposing liability would alleviate a person's obligation to protect oneself from the weather. See *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 11; 492 NW2d 472 (1992) (holding that an outdoor event organizer did not have a duty to warn "of a condition that the spectator is fully able to observe and react to on his own"). As the trial court noted, to impose the duties plaintiff alleges would be tantamount to making vessel operators the absolute insurer of the safety of their passengers regardless of the circumstances. This is especially true in this case where the undisputed eyewitness testimony reflected that the weather conditions suddenly changed and that Ryan showed no outward signs of distress. Again, Ryan was an adult, and no rational argument could be made that either Frederick or Dabish could have stopped Ryan from going swimming if he wanted to do so. Ryan was not required by law to wear a life jacket.[5]

The record reflected that when Ryan and the other swimmers jumped into the lake, there was nothing remarkable about the swimming or weather conditions. Indeed, the witnesses testified that they were able to tread water safely, and they described the weather conditions as what one would typically expect. Thus, it cannot reasonably be said that there was a degree of certainty that when Ryan jumped into the water he would drown.

In sum, under the facts of this case neither statutory nor common law imposed the duties alleged. Even assuming the duties were as plaintiff alleges, because plaintiff failed to prove that Frederick or Dabish's alleged negligence was a proximate cause of Ryan's death, summary disposition was appropriate. Plaintiff merely postulates that had the pontoon boat been closer, Ryan would have been able to swim to the pontoon boat and would not have drowned. There is no evidence that Ryan was attempting to swim to the boat or otherwise showing signs of distress such that the boat's distance was a proximate cause of his drowning. Factual causation cannot be established on a party's speculation. *Weymers v Khera*, 454 Mich 639, 648; 563 NW2d 647 (1997).

The trial court properly rejected plaintiff's experts' affidavits whereby they averred that boat operators have a duty to pay attention to the weather conditions, to anchor the boat to ensure the boat remains within a reasonable distance to swimmers, and to maintain a lookout for swimmers and be constantly aware of their location. Although boat operators have a general duty to exercise due care when operating a boat, plaintiff provided no case law below or on appeal that such duty includes the duties her experts alleged. Thus, plaintiff's experts' opinions constitute an interpretation and application of the law. The duty to interpret and apply the law is a function of the court, not experts. *Reeves v Kmart Corp*, 229 Mich App 466, 475; 582 NW2d 841 (1998). Even if this Court were to conclude that plaintiff's experts' opinions did not constitute a statement of the law, but rather those actions that a reasonable person would have exercised under the circumstances, plaintiff would not be entitled to relief. "Whether defendant acted with reasonable care is the standard for liability, not the test for determining whether a duty

[5] MCL 324.80142 requires that children under the age of six wear floatation devices.

exists." *Cipri*, 235 Mich App at 15. Hence, the trial court's refusal to consider plaintiff's experts' opinions in determining whether a duty existed was not an error requiring reversal.

C. WILLFUL AND WANTON MISCONDUCT AND GROSS NEGLIGENCE

Finally, plaintiff argues that Frederick and Dabish's failure to perform the duties alleged constituted willful and wanton misconduct and gross negligence. We disagree.

The elements of willful and wanton misconduct are:

> "(1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another, (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand, and (3) the omission to use such care and diligence to avert the threatened danger, when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another." [*Taylor v Laban*, 241 Mich App 449, 457; 616 NW2d 229 (2000), quoting *Miller v Inglis*, 223 Mich App 159, 166; 567 NW2d 253 (1997).]

Willful and wanton misconduct requires a showing of the intent to harm or such an indifference to whether harm will occur that it is the equivalent of intending the harm. *Jennings v Southwood*, 446 Mich 125, 138; 521 NW2d 230 (1994), quoting *Burnett v City of Adrian*, 414 Mich 448, 455-456; 326 NW2d 810 (1982). In other words, to prove a claim of willful and wanton misconduct, the plaintiff must prove that the defendant knew or had reason to know that the circumstances of the case would bring home the realization to a reasonable person that an injury was likely to occur, but chose to do nothing. See *id.*

Even when viewed in the light most favorable to plaintiff, the evidence does not reflect that Frederick or Dabish's alleged misconduct demonstrated an intent to harm Ryan or showed an indifference to whether an injury would occur constituting a willingness that the injury would happen. Thus, even if plaintiff were able to meet the first two elements, her claim would fail on the third element.

Additionally, plaintiff failed to show that Frederick or Dabish's conduct rose to the level of gross negligence. Gross negligence is the "intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them." *Patton v Grand Trunk Western R Co*, 236 Mich 173, 178-179; 210 NW 309 (1926), aff'd 238 Mich 397 (1927).[6] Duty is an essential element of gross negligence. *Smith v Jones*, 246 Mich App 270, 274; 632 NW2d 509 (2001). Because neither statutory law nor common law

[6] Plaintiff did not provide the trial court with a separate definition for gross negligence. Thus, the trial court treated plaintiff's gross negligence argument as part of its willful and misconduct argument. In *Xu v Gay*, 257 Mich App 263, 269 n 3; 668 NW2d 166 (2003), this Court held that gross negligence and willful and wanton misconduct are separate concepts.

require the duties plaintiff alleges, no genuine issue of material fact existed as to whether Frederick or Dabish's conduct constituted gross negligence.[7]

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering

[7] Frederick and Dabish, relying on the reckless misconduct standard articulated by our Supreme Court in *Ritchie-Gamester v City of Berkley*, 461 Mich 73; 597 NW2d 517 (1999), argue that the trial court properly granted summary disposition regarding this issue. In *Ritchie-Gamester*, our Supreme Court held that because participants in recreational activities voluntarily assume the risks inherent in the nature of the activity, a participant in a recreational activity does not have a cause of action when the resulting injury is one that is inherent to the activity unless the plaintiff can show that the defendant's conduct was either reckless or intentional. *Id*. at 83, 86. This reliance is misplaced. The reckless misconduct standard is a heightened standard of care, which our Supreme Court adopted to encourage vigorous participation in recreational activities or sports and to better reflect the actual expectations of those persons who participate in recreational activities *Id*. at 84, 89. Nevertheless, our Supreme Court did not intend that the reckless misconduct standard be applied in all cases involving recreational activities or sports. *Id*. at 84, 89 n 9. Instead, the Court intended that the standard be applied on a case-by-case basis depending on the facts of the case. *Id*. Given the facts of this case, it is not clear that the reckless misconduct standard should be applied. In any event, because plaintiff cannot demonstrate that Frederick or Dabish were negligent, she cannot meet her burden of proof regarding the reckless misconduct standard. *Id*. at 84.